Filed 5/17/19 P. v. Winston CA4/2
(unmodified opinion attached)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MYOHO WINSTON, Defendant and Appellant.	E068933 (Super.Ct.No. 16CR014016) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on May 3, 2019, be modified as follows:

1. On page 7, at the end of the first sentence of the second full paragraph after the words " shot her" add as footnote 3 the following footnote, which will require renumbering of all subsequent footnotes:

> [3] In his opening brief, Winston contends that the criminal threats conviction could have been based on any of several different acts, including his statements to Doe when he stopped the van under a freeway overpass, but he states that "it is more than likely that" the conviction was based on what he said to Doe immediately before she was pushed or jumped from the van. On the basis of his contention that it is impossible to determine

which act formed the basis for the criminal threats conviction, Winston raises arguments based on due process and the principle of lenity. The respondent's brief contends that, given both the firearm allegation as to count 3 and the prosecutor's argument to the jury, the criminal threats conviction must have been based on what Winston said to Doe immediately before she was pushed or jumped from the van. The respondent's brief concludes on that basis that Winston's due process and lenity arguments must fail, because they are based entirely on the alleged uncertainty about the basis for the criminal threats conviction. Winston's reply brief contains no response to these points. We agree with respondent.

There is no change in the judgment.

The petition for rehearing is denied.

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MENETREZ
J.

We concur:

MILLER
Acting, P. J.

SLOUGH
J.

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DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MYOHO WINSTON, Defendant and Appellant.	E068933 (Super.Ct.No. 16CR014016) OPINION

APPEAL from the Superior Court of San Bernardino County. R. Glenn Yabuno, Judge. Affirmed in part; reversed in part with directions.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Seth M. Friedman and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant is serving a second strike sentence of 21 years four months in prison for hitting the mother of his child, threatening to shoot her, and pushing her out of a speeding van onto the freeway. He argues in this appeal that the trial court should have stayed his sentence for criminal threats under Penal Code section 654[1] because he had the same intent and objective when he threatened to shoot her as when he pushed her out of the van through the door she opened in response to that threat. We disagree. However, we order the abstract of judgment to be corrected regarding clerical errors raised by defendant, we reverse the sentence, and we remand the matter to the trial court to consider striking the prior serious felony enhancement under the recently enacted Senate Bill No. 1393.

FACTS AND PROCEDURE

Defendant and Jane Doe lived together in an apartment with their two-year-old son. Defendant often physically abused Doe. During the day on April 16, 2016, or possibly a few days earlier, defendant and Doe argued about whether defendant could take their son shopping. Doe was worried about defendant running away with their son, as he had done before. During the argument, defendant punched Doe twice, on both sides of her face, with a closed fist. This formed the basis for the first count of corporal injury, which is not at issue in this appeal.

On the evening of April 16, 2016, defendant picked up Doe in his van after texting her to come and take a drive. Defendant was parked across the street from their apartment building. Doe got into the van and spoke to defendant, but he ignored her and continued to play a game on his cell phone for five to seven minutes. Defendant

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

eventually began to drive around the city but would not answer Doe each time she asked where they were going. Doe believed defendant was not speaking to her because he was angry. Doe eventually asked defendant to take her home to her son, to which he replied that their son was not at their apartment anymore. He told Doe that she would not see her son again, and that she had seen him for the last time. Doe was scared. She asked to be let out of the van, so defendant pulled over to the side of the road, under a dark freeway overpass, and said they would both get out. The situation did not feel "right" to Doe, so she did not get out. Defendant told Doe that he had an urge to kill her because she wanted to take their son and move to another state to be with her family. They sat in the van for seven to eight minutes until a car pulled up behind the van. At that point, defendant started the van and drove onto the freeway. Defendant was driving fast, and Doe kept asking him to take her home. She was afraid because he would not talk to her and because of his angry demeanor and cold eyes. Defendant at one point told Doe that he wanted to take her to a field and put her in the ground. Defendant told Doe something like, "Why don't you roll the window down and stick your head out of it so when I shoot you, the blood don't splatter back in my van." Defendant then reached down to the center console of the van, which is where Doe knew he kept a gun.[2] Doe "didn't wait to see what he was coming up with. I opened up the door, I took my seat belt off, and being that it's a van and being so far away from the door, I tried to put myself close to wait for help, just have somebody see that I need help, you know. I didn't do it to jump or

[2] Doe told the responding officer at the hospital that defendant pointed his gun at her head.

anything. I just wanted to get help." Doe was "hysterical" and waving to passing cars to get their attention. At trial, Doe testified that she fell out of the van accidentally. However, Doe told the responding police officer at the hospital that defendant had pushed her out of the van. Doe texted a friend two days after the incident that, "I opened the door to flag someone for help because he had a gun to my head and I felt a push." Bystanders who witnessed the incident and stopped to help, including the driver who hit Doe, testified that Doe said she had been pushed from the van. After Doe was ejected from the van, she hit the pavement and rolled several times before being hit by another vehicle that then crashed into an embankment and flipped onto its side. Doe suffered a severely broken ankle that required surgery, a broken tooth, a loose tooth, and abrasions. Defendant sped away from the scene and was later arrested.

In a second amended information filed October 5, 2016, the People alleged the following: count 1 that defendant inflicted corporal injury on a cohabitant resulting in a traumatic injury (§ 273.5, subd. (a)); count 2 that defendant committed assault with a firearm (§ 245, subd. (a)(2)); count 3 that defendant made criminal threats (§ 422, subd. (a)); and count 4 a second count that defendant inflicted corporal injury on a cohabitant resulting in a traumatic injury (§ 273.5, subd. (a)). As to count 3, the People alleged that defendant personally used a firearm (§ 12022.53, subd. (b)), and as to count 4 they alleged defendant personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). The People also alleged defendant had a prior conviction for robbery (§ 211), which qualified as both a serious or violent

felony (a "strike") (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and a serious felony (§ 667, subd. (a)(1)).

On November 3, 2016, a jury convicted defendant of count 1 (corporal injury), count 3 (criminal threats), and count 4 (corporal injury), and found true the great bodily injury allegation for count 4. The jury was unable to reach a verdict on count 2 (assault with a firearm) or the firearm allegation in count 3. Counts 3 and 4 are at issue in this appeal, along with the enhancement for the serious felony prior.

On December 8, 2016, the court found true the allegations that defendant had a robbery conviction, which served as both a strike prior and a serious felony prior.

On August 11, 2017, the court sentenced defendant to 21 years four months in prison as follows: count 4, corporal injury, the upper term of four years, doubled to eight years for the strike, plus five years consecutive for the great bodily injury enhancement, plus five years consecutive for the serious felony prior; count 1, corporal injury, two years consecutive; and count 3, criminal threats, 16 months consecutive. During argument at the sentencing hearing, defense counsel stated, "We would just note that potentially there could be a [section] 654 issue as to the [section] 422 and the latter of the [section] 273.5." The court noted when it was pronouncing the sentence that it was "electing consecutive terms because the court is finding that these are separate and distinct acts."

This appeal followed.

DISCUSSION

1. *Section 654*

Defendant argues the 16-month term for the criminal threat conviction in count 3 should have been stayed under section 654 because it was part of the same indivisible course of conduct underlying his conviction for corporal injury in count 4. We conclude that the argument lacks merit.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "'Section 654 precludes multiple punishments for a single act or indivisible course of conduct.'" (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1262.) When it applies, "the accepted 'procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.'" (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

"'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Correa* (2012) 54 Cal.4th 331, 336.) However, a defendant may be punished for each offense, "[i]f he [or she] entertained multiple criminal objectives which were independent of and not merely incidental to each other . . . even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8

Cal.3d 625, 639.) Additionally, punishment for each offense is not barred by section 654, if the facts support a finding of similar, but consecutively held objectives. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212.)

A defendant's intent and objective are factual questions for the trial court. (*People v. Green* (1988) 200 Cal.App.3d 538, 543-544.) "A trial court's [express or] implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

The parties agree that the criminal threats conviction is based on defendant's telling Doe to roll down the window and put her head out so her blood would not splatter in the van when he shot her. The corporal injury conviction in count 4 is based on defendant's subsequently pushing Doe out of the van. Defendant argues that his acts underlying the two convictions constitute an indivisible course of conduct for purposes of section 654 because "the evidence showed that [defendant] had only a single intent and objective—to either push Doe from a moving van or to cause her to jump from the van." We disagree.

On this record, a trier of fact could reasonably find that (1) when defendant threatened Doe, he intended only to terrorize her and did not yet harbor any intent to cause her physical harm either by shooting her or by pushing her out of the van, and (2) only after Doe opened the door did defendant form the intent to injure her by pushing her out. That is not, of course, the only version of the facts that a trier of fact could reasonably find—defendant's contrary version of the facts, in which defendant intended

all along to injure Doe, is likewise supported by substantial evidence, and the prosecution actually argued that version of the facts to the jury. But that is of no consequence, because the trial court's implied finding that defendant harbored separate and independent intents and objectives when he committed the two crimes is supported by substantial evidence. We accordingly must affirm the trial court's determination that there was no basis to stay the sentence on count 3 pursuant to section 654.

2. *The Abstract of Judgment Must Be Corrected*

Defendant argues, the People concede, and we agree that the abstract of judgment should be corrected to read as follows: The date of conviction for all counts should read "11/3/16" rather than "08/11/17"; the sentence for count 4 should read "8" years rather than "13" years; and the five-year enhancement for the serious felony prior should be noted in section 3.[3] We order that these clerical errors to be corrected on remand. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

3. *Senate Bill No. 1393*

After briefing was completed in this matter, defendant filed a motion requesting supplemental briefing, which this court granted. In his supplemental brief and supplemental reply brief, defendant contends that he is entitled to a remand so that he can be resentenced in light of Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1013, §§ 1, 2).

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[3] This assumes the trial court exercises its discretion under Senate Bill No. 1393, discussed *post*, not to dismiss the serious felony prior.

As mentioned, defendant admitted a prior serious felony conviction enhancement. (§ 667, subd. (a)(1).) The trial court imposed a five-year term on that enhancement.

When defendant was sentenced, the trial court had no power to strike a prior serious felony enhancement under section 667, subdivision (a)(1). (See former § 1385, subds. (b), (c)(2); Stats. 2014, ch. 137, § 1.) While this appeal was pending, however, Senate Bill No. 1393 was enacted, effective January 1, 2019. As a result, as of January 1, 2019, a trial court has discretion to strike a prior serious felony enhancement.

Defendant argues that he is entitled to the benefit of these ameliorative changes in the law, and the People agree. Absent some indication of a contrary legislative intent, "'[a]n amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date.'" (*People v. DeHoyos* (2018) 4 Cal.5th 594, 600.) A conviction is not final while an appeal from it is pending. (*Id*. at p. 597.)

Finally, the People do not argue that it would be an abuse of discretion to strike the prior serious felony enhancement. Accordingly, we will remand with directions to consider whether to strike this enhancement. We express no opinion on how the trial court should exercise its discretion.

DISPOSITION

The judgment with respect to the conviction is affirmed. The judgment with respect to the sentence is reversed. On remand, the trial court must resentence defendant in accordance with this opinion. In addition, the superior court clerk is directed to amend the abstract of judgment to reflect that the date of conviction is "11/3/16," the sentence

for count 4 is eight years and, should the court exercise its discretion under Senate Bill No. 1393 not to dismiss the prior serious felony conviction, show that defendant's sentence was enhanced by five years for the prior serious felony conviction under section 667, subdivision (a)(1). The court clerk is also directed to forward the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

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MENETREZ
J.

I concur:

SLOUGH
J.

[*People v. Myoho Winston*, E068933]

MILLER, J.

I concur in the result.

I agree with the majority's conclusion that the record supports that defendant harbored separate and independent intents and objectives when he committed the crimes of making terrorist threats in count 3 and corporal injury in count 4. However, I disagree with the majority's statement that this was not the only version supported by substantial evidence.

The majority concluded that the evidence supported the implied finding by the trial court that when defendant threatened Doe, he intended to only terrorize her and did not have the intent to physically harm, and it was only when defendant opened the door that he formed the intent to injure her by pushing her out of the van. I believe this the only interpretation that is supported by substantial evidence.

The threats to Doe were clearly intended to terrorize her and were complete prior to Doe opening the door to the van and defendant pushing her to cause pain and injury. (See *People v. Mejia* (2017) 9 Cal.App.5th 1036, 1047 [Fourth Dist., Div. Two] [m]entally or emotionally terrorizing the victim by means of threats is an objective separate from the intent to cause extreme physical pain.].) Doe testified that defendant said to her "why don't you roll the window down and stick your head out of it so when I shoot you, the blood don't splatter in the back in my van." Defendant's eyes were cold and he reached toward the middle of the van where she knew he kept a gun. Doe panicked and opened the van door. She tried

to summon help but was unsuccessful. Not until Doe opened the door to the van to try to get help did defendant push her out to inflict pain and injury or to silence her. The record supports only that defendant had separate intents and objectives in threatening Doe and subsequently hurting her.

MILLER

Acting P. J.